

NOT FOR PUBLICATION

NO. 24391

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

AMERICAN SAVINGS BANK, F.S.B., a federal savings bank,
Plaintiff-Appellee, v.
DIONISIO PALACIO PASION, and ANGELITA MIGUEL PASION, also known
as ANGELITA PASION, Defendants-Appellants, and
GE CAPITAL HAWAII, INC., and INTERNATIONAL ROOFING, INC.,
Defendants-Appellees, and
JOHN and MARY DOES 1-20 and DOE PARTNERSHIPS, CORPORATIONS or
OTHER ENTITIES 1-20, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIV. NO. 00-1-3243)

SUMMARY DISPOSITION ORDER

(By: Watanabe, Acting C. J., Lim and Foley, JJ.)

Defendants-Appellants Dionisio Palacio Pasion and
Angelita Miguel Pasion (the Pasion) appeal the June 6, 2001
final judgment of the circuit court of the first circuit, the
Honorable R. Mark Browning, judge presiding, and the underlying
findings of fact, conclusions of law and order of even date that
granted the motion for summary judgment and for interlocutory
decree of foreclosure brought by Plaintiff-Appellee American
Savings Bank, F.S.B. (ASB).

After an assiduous review of the record and the briefs
submitted by the parties, and giving careful consideration to the
arguments advanced and the issues raised by the parties, we
resolve the Pasion's points of error as follows:

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1. The Pasions argue that the court erred in granting summary judgment, because (a) ASB did not submit admissible evidence of loan default, and (b) ASB did not submit the entire loan general ledger. We disagree.

(a) The declaration of Anson M. Pang (Pang), the manager of collection and recovery for ASB, which was attached to ASB's motion for summary judgment, was "made on personal knowledge," Hawai'i Rules of Civil Procedure (HRCP) Rule 56(e), and showed "affirmatively that [Pang was] competent to testify to the matters stated therein." Id. Cf. Nakato v. Macharg, 89 Hawai'i 79, 89, 969 P.2d 824, 834 (App. 1998) (attorney's declaration, in support of a motion for summary judgment, purporting to authenticate a document he received from a third party, was not based on personal knowledge); GECC Fin. Corp. v. Jaffarian, 79 Hawai'i 516, 525, 904 P.2d 530, 539 (App. 1995) (affidavit submitted in support of motion for summary judgment "failed to demonstrate how, as an employee of a *financial* institution, [the affiant] had personal knowledge of and was competent to testify about the accepted trade practices of the *automobile* industry" (emphases in the original)), aff'd and modified, 80 Hawai'i 118, 905 P.2d 624 (1995). Further, "[s]worn or certified copies of all papers or parts thereof referred to in [Pang's declaration were] attached thereto[.]" HRCP Rule 56(e). See also Pac. Concrete Fed. Credit Union v. Kauanoe, 62 Haw. 334, 336-37, 614 P.2d 936, 938 (1980) (HRCP Rule 56(e) requires that

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"papers referred to in the affidavits [supporting a motion for summary judgment] must also be attached and sworn to or certified"); Hawaii Cmty. Fed. Credit Union v. Keka, 94 Hawai'i 213, 222, 11 P.3d 1, 10 (2000) (same); GE Capital Hawaii, Inc. v. Yonenaka, 96 Hawai'i 32, 39-40, 25 P.3d 807, 814-15 (App. 2001) (same); GE Capital Hawaii, Inc. v. Miguel, 92 Hawai'i 236, 241, 990 P.2d 134, 139 (App. 1999) (same); Nakato, 89 Hawai'i at 87, 969 P.2d at 832 (same); Fuller v. Pac. Med. Collections, Inc., 78 Hawai'i 213, 224, 891 P.2d 300, 311 (App. 1995) (same). In addition, Pang's declaration and the partial loan ledger attached thereto "set forth such facts as would be admissible in evidence," HRCF Rule 56(e); see also Kauano, 62 Haw. at 336, 614 P.2d at 938 (HRCF Rule 56(e) "requires that facts set forth in the affidavits [supporting a motion for summary judgment] be admissible in evidence"); Keka, 94 Hawai'i at 222, 11 P.3d at 10 (same); Yonenaka, 96 Hawai'i at 39-40, 25 P.3d at 814-15 (same); Miguel, 92 Hawai'i at 241, 990 P.2d at 139 (same); Nakato, 89 Hawai'i at 87, 969 P.2d at 832 (same); Jaffarian, 79 Hawai'i at 524-25, 904 P.2d at 538-39 (same); Fuller, 78 Hawai'i at 224, 891 P.2d at 311 (same), pursuant to the hearsay exception for records of regularly conducted activity embodied in Hawaii Rules of Evidence (HRE) Rule 803(b)(6), Yonenaka, 96 Hawai'i at 40, 25 P.3d at 815 (mortgage loan ledgers are admissible on a motion for summary judgment if they qualify under HRE Rule 803(b)(6)); Miguel, 92 Hawai'i at 242, 990 P.2d at 140 (same), that clearly

showed the Pasions' default in payment on the loan.

(b) No law requires that the entire loan general ledger always be submitted on a motion for summary judgment and for interlocutory decree of foreclosure in order to show default in payment on the loan. Here, Pang's declaration and the partial loan ledger attached thereto sufficed to show the Pasions' default. See Ocwen Fed. Bank, FSB, v. Russell, 99 Hawai'i 173, 184, 53 P.3d 312, 323 (App. 2002).

2. The Pasions argue that the court erred in granting summary judgment because they had raised a "genuine issue for trial[,]" HRCF Rule 56(e), with respect to common law recoupment damages for ASB's alleged violation of the federal Truth in Lending Act (TILA). See Kauanoē, 62 Haw. at 338-43, 614 P.2d at 939-43; Keka, 94 Hawai'i at 224, 11 P.3d at 12. Again, we disagree.

First, the Pasions did not counterclaim on or otherwise plead below a common law recoupment damages defense, and thereby waived it. HRCF Rule 8(c); Hawaii Broad. Co., Inc. v. Hawaii Radio, Inc., 82 Hawai'i 106, 112, 919 P.2d 1018, 1024 (App. 1996). Instead, the Pasions answered the complaint with a "[TILA] rescission" defense. In their written opposition to ASB's motion for summary judgment, the Pasions likewise raised the defense of "rescission by way of recoupment[.]" A rescission defense was barred three years after consummation of the loan transaction. Keka, 94 Hawai'i at 224, 11 P.3d at 12. On appeal,

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we "will not consider issues beyond those that are properly raised in the trial court[.]" Demond v. Univ. of Hawaii, 54 Haw. 98, 103, 503 P.2d 434, 437 (1972) (citations omitted).

Second, even assuming, *arguendo*, that the Pasions properly raised their recoupment damages defense below, ASB was nonetheless entitled to summary judgment:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

HRCP Rule 56(e). See also Russell, 99 Hawai'i at 183, 53 P.3d at 322; Yonenaka, 96 Hawai'i at 37, 25 P.3d at 812; Miguel, 92 Hawai'i at 241, 990 P.2d at 139; Hawaii Broad., 82 Hawai'i at 112, 919 P.2d at 1024; Jaffarian, 79 Hawai'i at 521, 904 P.2d at 535; Miller v. Manuel, 9 Haw. App. 56, 65, 828 P.2d 286, 292 (1991); Hall v. State, 7 Haw. App. 274, 284, 756 P.2d 1048, 1055 (1988). Other than declaring that, "I was not provided with a dated copy of the [TILA] NOTICE OF THE RIGHT TO CANCEL that stated when the 3 day rescission period expired[.]" the Pasions did not, by way of affidavit, declaration, documentation or otherwise, "set forth specific facts showing that there is a genuine issue for trial." HRCP Rule 56(e). The Pasions could not "rest upon the mere allegations or denials of [their] pleading," *id.*; see also Chuck Jones & MacLaren v. Williams, 101 Hawai'i 486, 501, 71 P.3d 437, 452 (App. 2003), especially where, as here, their pleaded

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rescission defense was invalid *ab initio*. In particular, the Pasions nowhere specified how they were damaged by ASB's alleged TILA violation, or what amount they were entitled to recoup, and thus failed to establish a material element of their defense. Cf. Williams, 101 Hawai'i at 500, 71 P.3d at 451 (monetary damages are a material element of a claim for breach of contract).

[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. "[T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rules of Procedure 50(a). . . ." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 213 (1986).

Celotex Corporation v. Catrett, 477 U.S. 317, 322-323, 106 S.Ct. 2548, 2552-2553, 91 L.Ed.2d 265, 273-274 (1986).

Hall, 7 Haw. App. at 284, 756 P.2d at 1055 (1988) (brackets and ellipsis in the original). Indeed, nowhere below did the Pasions explain how, with their right of rescission expired, their recoupment damages could defeat the claim ASB brought in this case, for foreclosure but not a deficiency judgment. The Pasions' references on appeal to "a potential recoupment monetary offset[,]" and the possibility that "the loan might actually as a matter of law have been current due to such recoupment damage

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offsets[,]" (footnote omitted), demonstrate that their recoupment damages defense remains, to this day, merely conclusory and wholly speculative. Cf. Williams, 101 Hawai'i at 501, 71 P.3d at 452 ("conclusory statements, in and of themselves and devoid of specific supporting facts," in a nonmoving party's declaration in opposition to a motion for summary judgment, were insufficient to raise a genuine issue of material fact regarding the reasonableness of the attorneys' fees claimed).

Therefore,

IT IS HEREBY ORDERED that the June 6, 2001 final judgment of the court, and the underlying findings of fact, conclusions of law and order of even date, are affirmed.

DATED: Honolulu, Hawai'i, January 26, 2004.

On the briefs:

Gary Victor Dubin, for
defendants-appellants.

Acting Chief Judge

Robert M. Earhorn, Jr. and
Elizabeth A. Kane (Takushi
Funaki Wong & Stone), for
plaintiff-appellee.

Associate Judge

Associate Judge